

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

DIVISION OF ADMINISTRATIVE LAW  
APPEALS

RAYMOND G. GARCIA,  
Claimant

v.

Docket No. DET-08-207

DIVISION OF UNEMPLOYMENT  
ASSISTANCE,  
Respondent

July 2, 2008

Appearance for Claimant:

Raymond G. Garcia, *pro se*  
31 Elk Drive  
Bedford, NH 03110-4622

Appearance for Respondent:

Julayne L. Kosmas, Esq.  
Deputy Director of Labor Relations  
Department of Workforce Development  
19 Staniford St., 3rd fl.  
Boston, MA 02114

Administrative Magistrate:

Mark L. Silverstein, Esq.

**DECISION**

In this appeal, claimant Raymond G. Garcia, employed formerly by respondent Massachusetts Department of Workforce Development's Division of Unemployment Assistance ("the Agency") as its Director of Network Services until his discharge on February 8, 2008, challenges the Agency's subsequent denial of his claim for unemployment insurance benefits. The Agency discharged Mr. Garcia for violating its code of conduct for managers and its nondiscrimination and workplace

violence policy. It alleged that Mr. Garcia denied a reasonable request by another manager, Mark Hebert, who was suffering from the effects of multiple sclerosis, to accommodate his disability-based work schedule by scheduling weekly managers staff meetings to start at 10:00 a.m. rather than at 9:30 a.m. The Agency then found Mr. Garcia disqualified, under M.G.L. c. 151A, § 25(e)(2), from receiving unemployment insurance benefits on account of deliberate misconduct and a knowing violation of a uniformly-enforced rule or policy.<sup>1</sup> The Agency informed Mr. Garcia of its decision denying his unemployment benefits claim by notice dated March 17, 2008.

Mr. Garcia denies having engaged in any such conduct, and on March 21, 2008 he appealed the unemployment benefits denial by filing a timely hearing request with the Agency. His version of events is that after Mr. Hebert requested a later staff meeting starting time, he rearranged his other agency obligations as IT coordinator (including other regularly-scheduled meetings regarding Agency network maintenance), and within two weeks he was able to reschedule the weekly managers staff meetings to begin at 10:00 a.m. rather than at 9:30 a.m., as Mr. Hebert had requested.

The Agency referred the appeal to the Division of Administrative Law Appeals (DALA). I held a hearing at DALA's Boston office on April 25, 2008. Because the Agency discharged Mr. Garcia, it had the burden of proving, with substantial evidence, all of the facts required to establish Mr. Garcia's disqualification from receiving unemployment compensation benefits. See Cantres v. Div. of Employment Security, 396 Mass. 226, 484 N.E.2d 1336 (1985); Still v. Dep't of Employment and Training, 39 Mass. App. Ct. 502, 657 N.E.2d 1288, 1292 (1995). The Agency presented testimony by two witnesses, Mr. Hebert and Lois J. Shaevel, the Department of Workforce Development's Deputy Director of Human Resources. Mr. Garcia testified on his own behalf. I

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<sup>1</sup>/ M.G.L. c. 151A, § 25 provides in pertinent part that:

...no benefits shall be paid to an individual under this chapter...(e)...after the individual has left work...(2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence...

admitted ten documents into evidence (Exhs. 1—7, for the Department, and Exhs. G-1—G-3 for Mr. Garcia).<sup>2</sup> There are three cassette tapes of the hearing. Both the Agency and Mr. Garcia requested, and were granted, leave to file post-hearing memoranda and did so on May 2, 2008.

### Findings of Fact

1. Mr. Garcia served in the United States Navy for 21 years until December 1998, at which time the United States Department of Veterans Affairs' Regional Office in Manchester, New Hampshire determined that he was 60% disabled and eligible for service-related disability compensation. His disability included "Meniere's syndrome with vertigo, tinnitus and sensory neural deafness evaluated at 30% disabling, degenerative disk condition evaluated at 20% disabling, right knee condition evaluated at 10% disabling and left knee condition evaluated at 10% disabling." (Garcia cross; Exhs. G-2, G-3).

2. From 1998 until June 2007, Mr. Garcia was employed by Parexel (based in Waltham, Massachusetts) as IT (Information Technology) manager. (Garcia cross)

3. Mr. Garcia was next employed by the Agency as its Director of Network Services, an upper-level agency management position classified as Administrator VIII, at an annual salary of \$92,877.20. His employment at the agency started on June 7, 2007 and ended on February 8, 2008, when the Agency terminated him. (Garcia cross; Exh. 6)

4. On his first day of work at the Agency (June 7, 2007), Mr. Garcia signed an "Employee Sign-Off Form" acknowledging that he had received, and was responsible for reading, understanding and complying with, various Commonwealth and Agency written policies (Exh. 5), including the

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<sup>2/</sup> The Agency objected to Mr. Garcia's exhibits showing his own disability (Exhs. G-2 and G-3) because he did not self-identify to the Agency as a disabled person. I overruled the objection because the exhibits appeared to be relevant to whether Mr. Garcia knowingly violated the workplace rules and policies in question; in addition, they also appeared relevant to his defense that he never intended to discriminate or deny reasonable accommodation to Mr. Hebert, particularly on the basis of disability, and that, instead, he dealt daily with pain himself, sympathized with Mr. Hebert, and did all he could to accommodate his request to schedule managers staff meetings to begin later. I allowed the Agency to pursue an argument regarding the weight, if any, that should be given to the exhibits.

Commonwealth's "Code of Conduct for Managers and Employees Not Employed Pursuant to Collective Bargaining Agreements" (Exh. 1) and the Agency's "Non-Discrimination Policy" (Exh. 2).

5. The Commonwealth's "Code of Conduct for Managers and Employees Not Employed Pursuant to Collective Bargaining Agreements" (Exh. 1) provides, at § 3.03, that "[e]mployees shall comply with all of the policies and operating procedures of the agency/department in which they work." It also provides, at § 3.04, that "...all employees shall avoid any action which may result in or create a reasonable basis for the impression of...© making work-related decisions contrary to agency/department policy; or (d) using one's official position to harass or intimidate any person or entity."

6. The Agency's "Non-Discrimination Policy" (Exh. 2) provides, at Part II.D, that "[a]ny employee found to have discriminated, harassed, intimidated, retaliated or interfered in any way with the creation and maintenance of a fair working environment will be dealt with swiftly and severely."

7. Mark Hebert has been employed by the Agency for 24 years. For the past 14 years, he has served as Manager of Customer Support in the Agency's IT (Information Technology) Department. (Hebert dir)<sup>3</sup>

8. Mr. Hebert is a self-identified disabled employee who suffers from the effects of multiple sclerosis. Following an absence due to this illness from November 2004 through part of December 2005, Mr. Hebert returned to his management position on a reduced work week basis, initially two days per week and five hours per work day, increasing to three and then to four days per week by 2007, from 10:00 a.m. to 6:00 p.m. Mornings are particularly painful times for Mr. Hebert, and he has difficulty walking, cannot commute by train, and must drive to work at times when traffic is lighter because sitting while driving is also painful. (Hebert dir)

9. Mr. Hebert explained his disability, working hours and the reasons for them to Mr. Garcia,

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<sup>3</sup>/ References are to direct (dir) hearing testimony, testimony on cross-examination (cross), redirect examination (redir), testimony on re-cross examination (recross) and testimony on questioning by the Administrative Magistrate (AM).

to whom he reported directly, and it was his impression that “in the beginning, Mr. Garcia didn’t seem to have a problem with it.” (Hebert dir)

10. Upon starting work at the Agency, Mr. Garcia found what he perceived to be serious problems with the IT Department’s lack of direction and customer support,<sup>4</sup> to the point that the IT Department appeared “dysfunctional.” It was his understanding that he had been hired to correct these problems and establish orderliness in the Agency’s IT operations. His approach to performing this task included meeting with all of the IT managers, including Mark Hebert, individually and at weekly staff meetings. (Garcia dir and cross)

11. Setting a regular starting time for weekly managers staff meetings proved problematic. Many IT employees were working outside the core Agency hours, beginning work as early as 4 a.m. and departing between 12 noon and 3 p.m., which caused IT staffing shortages during the afternoon. Mr. Garcia had difficulty identifying regular IT workday core hours that would accommodate everyone. (Hebert dir; Garcia dir)

12. In September 2007, Mr. Garcia set the starting time for weekly managers staff meetings at 9:30 a.m. every Friday. (Hebert dir, Garcia dir)

13. On October 4, 2007, Mr. Hebert sent an email to Mr. Garcia requesting that he begin these meetings at 10:00 a.m. rather than at 9:30 a.m. (Exh. 3; email dated Thursday, October 4, 2007, 4:15 p.m.). The email stated:

Ray - Is it possible for you to start this meeting later in order to accommodate my start time of 10:00 a.m.? It’s gonna be awkward coming in late or missing the meeting all the time.  
Mark H.

14. In order to change the weekly managers meeting starting time from 9:30 a.m. to 10:00 a.m., Mr. Garcia needed to reschedule other meetings that had been scheduled at and after 10:00 a.m., including his meetings with the Agency’s chief information officer, IT security meetings that were scheduled for Fridays at 10:30 a.m., and meetings with other agencies. Mr. Garcia made these

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<sup>4</sup>/ The “customers” in question were other divisions of the Agency and other Massachusetts state government agencies. (Garcia cross)

changes by October 12, 2007, within eight days of Mr. Hebert's request for the later meeting start time. Once Mr. Garcia had rescheduled these other meetings, he was able to reschedule the weekly managers meetings to 10:00 a.m., although not in time for the October 12, 2007 weekly managers staff meeting, which began at 9:30 a.m. The next managers staff meeting, on October 19, 2007, started at 10:00 a.m. (Garcia dir; Garcia cross)

15. During the morning of Friday, October 12, 2007, Mr. Hebert and Mr. Garcia exchanged the following emails regarding weekly managers meeting start times (Exh. 3: four emails dated October 12, 2007 between 10:20 a.m. and 11:55 a.m.):

(a) At 10:40 a.m. on that date, Mr. Hebert sent the following email to Mr. Garcia:

Ray - Hello,  
I received your voicemail this am about attending your 9:30 am meeting. But in light of this message below which I sent you last week and another message I sent you earlier in September (both to which I received no response), I am confused about your expectations. I would like to meet one on one asap to discuss this. Please let me know when you are available today or Monday and I will come down to your office. Thanks.  
Mark H.

(b) At 11:05 a.m., Mr. Garcia replied to Mr. Hebert:

Mark,  
What was my reply? Even if you are late is better than not showing up at all.  
Thanks.  
Raymond Garcia.

(c) At 11:40 a.m., Mr. Hebert replied:

Ray - You did not reply, as I said.  
And coming in late every week is not acceptable.  
I'm having trouble understanding why the time can't be changed to accommodate when I start.  
Mark H.

(d) At 11:55 a.m., Mr. Garcia replied:

Mark,  
What I'm trying to accommodate is the majority and your presence is critical. What I've heard since coming to this agency is not about providing customer service, it's all about accommodations. Your department is the most outward facing group and there are times that need to be addressed and improved. In order for this to happen, you need to be available. When I arranged these Friday meetings, you stated that you could come in early, great. Now I'm hearing something different. As you have seen by the update to these meetings, you should have no problem attending. I still need

to speak with you concerning your department and I would like to get an update as to what your staff is working on. Please come to my office at 2:30 this afternoon.  
Thanks,  
Raymond Garcia.

(emphasis added).

16. The “update to these meetings” to which the last of the four October 12, 2007 emails referred was the change in the starting time of the weekly managers staff meeting, from 9:30 to 10:00 a.m., that Mr. Garcia implemented starting with the meeting held on October 19, 2007. (Hebert cross; Garcia cross; Exh. 3)

17. Mr. Garcia did not seek assistance from the Agency’s Deputy Director of Human Resources, Lois J. Shaevel, or from anyone else at the Agency, regarding Mr. Hebert’s request to change the time of the weekly managers staff meeting from 9:30 a.m. to 10:00 a.m. He perceived no conflict or problem requiring such assistance because he made the meeting start time change Mr. Hebert had requested. (Garcia cross)

18. After Mr. Garcia changed the weekly managers meeting starting time from 9:30 a.m. to 10:00 a.m., Mr. Hebert requested and was granted a one-on-one meeting with Mr. Garcia. At the meeting, which was held some time later in October 2007, Mr. Hebert asked whether Mr. Garcia was “out to get him.” Mr. Garcia said he was not, and that his intention was, instead, to make sure that complaints (about IT performance and employee conduct) were addressed in a timely manner, and that IT provided support to its customers (the Agency and other state agencies). Mr. Garcia conceded that he was “frustrated at times” with Mr. Hebert’s performance as manager of IT customer support because Mr. Hebert was out of the office approximately 50 percent of the work week. Mr. Garcia suggested that Mr. Hebert could consider working from home on one of his four work-week days, or work a fifth day from home. (Garcia dir and cross)

19. During the Fall of 2007, Mr. Garcia was dissatisfied with Mr. Hebert’s performance regarding several other matters, and this generated disagreement between them.

(a) Mr. Garcia received what he characterized as a large number of complaints about an IT staffperson managed by Mr. Hebert, including allegedly rude and unprofessional

conduct, and he directed Mr. Hebert to investigate this. By mid-September 2007, Mr. Garcia had received additional complaints about this staffperson's conduct. He told Mr. Hebert he was not satisfied with how the matter was being addressed and suggested that he order the staffperson to attend counseling. Mr. Garcia remained dissatisfied when he learned later that no such counseling had occurred. Counseling for the staffperson was scheduled ultimately, but Mr. Hebert told Mr. Garcia that he disagreed with this approach. (Garcia dir)

(b) One of the employees Mr. Hebert managed worked at the Agency's Lawrence Call Center's IT help desk and wanted to continue doing so, but the Call Center's director was opposed. This conflict came to Mr. Garcia's attention, and he spoke with Mr. Hebert about it in late October 2007. Mr. Hebert told Mr. Garcia that the employee was working at the Call Center pursuant to her request for a reasonable accommodation, and that denying the request would violate workplace nondiscrimination policy. Mr. Garcia directed Mr. Hebert to send an email to the Lawrence Call Center's director asking whether the employee's request could be honored. When Mr. Garcia asked Mr. Hebert later whether he had made this inquiry, Mr. Hebert told him that he had not done so. (Garcia dir)

(c) Beginning in December 2007, the Agency's IT Department was deploying antivirus software for desktop workstations and Mr. Garcia was assigning responsibility for this project. Mr. Garcia asked Mr. Hebert to report on project status, but received no status report from him. He also asked Mr. Hebert why he had told the Agency's Chief Information Officer that the software deployment had been completed when the project remained incomplete, but Mr. Hebert did not reply. Mr. Garcia wrote to the Agency's Director of Labor Relations (Roberta Newcomb) and Diversity Officer (Kenneth Owens) expressing his concern with Mr. Hebert's conduct. Owens told him to do nothing and wait. (Garcia dir).

20. Mr. Garcia met with the Agency's Deputy Director of Human Resources, Lois J. Shaevel, regarding the Lawrence Call Center employee situation (see para. 20(b) above) in late

October 2007 or at a later date. (Garcia dir; Shaevel dir)<sup>5</sup>

21. Ms. Shaevel encouraged such meetings because they helped elicit creative solutions by managers to workplace problems, and was “glad that he (Mr. Garcia) came in to discuss” the matter. The workplace problem at issue during this meeting was how to allow a request for reasonable accommodation while at the same time meeting the needs of the Agency’s customers, and how to balance the accommodation with the employee’s ability to meet job expectations. During the meeting Mr. Garcia was quiet, engaged in the discussion, and not resistant to her suggestions. (Shaevel dir; Shaevel AM)

22. Ms. Shaevel recalled that during the fall of 2007 she was having “so many discussions with other managers” about how to balance the “values” of individual employee accommodation and agency customer needs. The advice she gave at the time was that a “strategic balancing” of these values was needed, but it was a “challenge to figure out” how to balance them because “neither value was predominant.” It was not unusual to observe an “initial resistance” by an Agency manager to a request for reasonable accommodation, and some managers viewed accommodating the request as a “power struggle.” It was the responsibility of every Agency manager to balance these values, and she and the managers “worked very hard to do the best we can.” The Agency did not instruct how these conflicting values were to be balanced; nor did it impose a deadline on resolving a conflict between accommodating an agency’s customers’ needs and individual accommodation needs. (Shaevel AM)

23. Ms. Shaevel concluded that Mr. Garcia was resistant to Mr. Hebert’s request to start weekly managers staff meetings at 10:00 a.m. rather than at 9:30 a.m., that he viewed the request as a “power struggle” matter, and that he “took too long” to change the meeting time. She based these conclusions upon the assumption that Mr. Garcia conducted four meetings at 9:30 a.m. before he accommodated Mr. Hebert’s request, and because “from the emails” (meaning the email exchange

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<sup>5</sup>/ The witnesses were unable to be more precise about the meeting date. Mr. Garcia recalled a meeting in late October; Ms. Shaevel believed that the meeting took place in late December 2007 or in early January 2008.

between Mr. Hebert and Mr. Garcia on October 12, 2007; see Exh. 3), the “power struggle” between them “appears to have lasted,” although she did not say for how long. (Shaevel AM)

24. Ms. Shaevel’s assumption that Mr. Garcia conducted four meetings at 9:30 a.m. before he accommodated Mr. Hebert’s request was erroneous, because:

(a) Mr. Hebert requested the later start date at 4:15 p.m. on October 4, 2007;

(b) the October 5, 2007 managers staff meeting was held at 9:30 a.m., as scheduled;

© after rescheduling other IT meetings, Mr. Garcia changed the start time to 10:00 a.m. by October 12, 2007, eight days after Mr. Hebert requested this change, although the October 12 managers staff meeting was held at 9:30 a.m.;

(d) the October 19, 2007 meeting started at 10:00 a.m., as did the weekly managers staff meetings held after that date; and

(e) therefore, two weekly managers staff meetings, rather than four, were held at 9:30 a.m. (on October 5 and 12, 2007) after Mr. Hebert requested the later start time. See findings above at paras. 13-16.

25. Mr. Garcia learned in early November 2007 that Mr. Hebert had filed an internal discrimination complaint against him. Mr. Garcia was interviewed twice by Agency employees who told him on each occasion that they were conducting an internal investigation on behalf of the Agency’s Office of Diversity. The first of these interviews, conducted by Nancy Stolberg, the director of the Agency’s Office of Civil Rights, occurred in early November 2007. The second interview, in early 2008, was conducted by Kenneth Owens, the Agency’s Diversity Officer at the time, and by Roberta Newcomb, the Agency’s Director of Labor Relations. (Garcia cross)

26. By memorandum dated February 8, 2008, the Agency notified Mr. Garcia that:

The investigation into Mr. Mark Hebert’s complaint of disability discrimination has been completed.

Mr. Hebert alleged that he has been made uncomfortable in his work environment due to the jokes, inappropriate comments and hostile treatment by you, his direct supervisor.

Based upon the results of a thorough investigation a finding has been made that you

violated the DUA (Division of Unemployment Assistance) Non-Discrimination Policy, the Code of Conduct for Managers and Employees Not Employed Pursuant to Collective Bargaining Agreements and the DUA Policy of Zero Tolerance for Workplace Violence.

(Exh. 7: Memorandum, Kenneth Owens, Office of Hearings Administration, to Raymond Garcia, Director, Information Technology Network Services, re: Discrimination Complaint, dated February 8, 2008)

27. On February 8, 2008, the Agency notified Mr. Garcia that his employment was terminated “effective immediately.” (Shaevel dir; Exh. 6: Memorandum, Lois Shaevel, Deputy Director of Human Resources, to Ray Garcia, Director of Network Services, re: Termination, dated February 8, 2008). The Agency’s termination letter did not state the grounds for termination. (Exh. 6)

28. Mr. Garcia filed a claim for unemployment insurance benefits with the Division of Unemployment Assistance on March 6, 2008. The Division denied Mr. Garcia’s claim in a Notice to Claimant of Disqualification that it issued to him on March 17, 2008. According to the Notice, Mr. Garcia’s claim for unemployment insurance benefits was denied, pursuant to M.G.L. c. 151A, § 25(e)(2), on account of his discharge from employment “because of discriminatory and threatening behavior towards an employee” under his supervision, “which was a knowing violation of a uniformly enforced policy” of his employer.

#### Discussion

1.

In determining this appeal I do not second-guess the Agency’s decision to dismiss Mr. Garcia, whose employment as a state agency manager was at-will and therefore terminable whether or not the alleged code of conduct and nondiscrimination policy violations occurred.

However, Mr. Garcia was not automatically disqualified from receiving unemployment insurance benefits under M.G.L. c. 151A, § 25(e)(2) because the Agency found that he had violated

the Agency's nondiscrimination and workplace nonviolence policies and its managers' code of conduct. A violation of workplace rules or policies that may have justified an employee's discharge "does not necessarily amount to misconduct for unemployment compensation purposes." Torres v. Div. of Employment Security, 387 Mass. 776, 443 N.E.2d 1297, 1300 (1982), quoting Smith v. Div. of Employment Security, 376 Mass. 563, 382 N.E.2d 199, 202 (1978). According to the plain language of M.G.L. c. 151A, § 25(e)(2), disqualification for unemployment insurance benefits results only if the employee was discharged for "a knowing violation of a reasonable and uniformly enforced rule or policy of the employer." (emphasis added). The employee's state of mind is critical; for the violation to have been "knowing," the employee must have known not only that the rule or policy in question existed but also that his conduct was violating it. Franclemont v. Dep't of Employment and Training, 42 Mass. App. Ct. 267, 676 N.E.2d 1147, 1151 (1997); Still v. Dep't of Employment and Training, 39 Mass. App. Ct. 502, 657 N.E.2d 1288, 1293 (1995). It is not enough, therefore, that the employee knew of the rule or policy or even that the employee's conduct violated it; the violation must have been intended, and substantial evidence must support a conclusion that it was. Still; 657 N.E.2d at 1292.

Still enunciated six "paramount principles" that apply in determining whether an employee's violation of an employer's rule or policy justifies disqualification from receiving unemployment benefits under M.G.L. c. 151A, § 25(e)(2). In the order in which the Appeals Court listed them, these principles are:

(1) The statute is to be construed "in light of '[t]he purpose of unemployment compensation...to provide compensation for those who are thrown out of work through no fault of their own.'" 657 N.E.2d at 1292, quoting Leone v. Div. of Employment Security, 397 Mass. 728, 494 N.E.2d 493, 496 (1986).<sup>6</sup>

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<sup>6</sup>/ The decisions cited by Still as enunciating principles to be applied in construing M.G.L. c. 151A, § 25(e)(2) were issued before 1992, when the only ground for disqualification from receiving benefits under M.G.L. c. 151A, § 25(e), other than voluntarily leaving employment or the employee's incompetence, was "deliberate misconduct in wilful disregard of the employing unit's interest." A 1992 amendment added knowing violation of an employer's reasonable and uniformly-enforced rule or policy

(2) The “critical issue” in determining whether disqualification from receiving unemployment benefits is warranted “‘is the claimant’s state of mind in performing the acts that cause his discharge.’” 657 N.E.2d 1292, quoting Garfield v. Div. of Employment Security, 377 Mass. 94, 384 N.E.2d 642, 644 (1979).

(3) Mitigating factors, if any, must be taken into account in determining the employee’s state of mind, among them disease (including alcoholism), stress, serious personal problems, or factors that caused the employee to be unusually fatigued when the alleged violation occurred. 657 N.E.2d 1292.

(4) An agency decision disqualifying an unemployment compensation benefits claimant cannot stand unless it includes “specific, subsidiary findings on the issue of the claimant’s state of mind” that are “supported by substantial evidence.” Id.

(5) “[T]he employer has the burden of proving all of the facts required to establish disqualification.” Id.

(6) “[T]he entire compensation scheme must be ‘construed liberally’ in favor of the employee, given the overriding purpose of c. 151A ‘to lighten the burden which...falls on the unemployed worker and his family.’ ” Id., quoting M.G.L. c. 151A, § 74.

2.

It is undisputed that Mr. Garcia received the Agency’s nondiscrimination and workplace violence policies. The Agency found that he had violated these policies by engaging in discriminatory conduct relative to Mr. Hebert’s accommodation request (rescheduling the weekly managers meeting starting time from 9:30 a.m. to 10:00 a.m.) and terminated his employment. Per Still, however, this is not sufficient to disqualify Mr. Garcia from receiving unemployment insurance

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as a ground for disqualification from receiving benefits. The Supreme Judicial Court concluded, however, that the amendment did not alter the manner in which the statute was to be construed, 657 N.E.2d at 1292, and it applied the previously-enunciated principles of construction to the amended statute, consequently.

benefits under M.G.L. c. 151A, § 25(e)(2). The critical issue, relative to unemployment benefits disqualification, is Mr. Garcia's state of mind in handling Mr. Hebert's request that the starting time of weekly managers staff meetings be moved from 9:30 a.m. to 10:00 a.m. in order to accommodate his disability-based work schedule. I turn first, therefore, to the evidence regarding Mr. Garcia's state of mind.

a.

Mr. Garcia's testimony on this point was that he worked to rearrange other scheduled IT meetings and responsibilities so that the meetings could start at 10:00 a.m., as Mr. Hebert requested on October 4, 2007 (see above, at pp. 5-7, paras. 13-16). He was able to accomplish this by October 12, 2007, within eight calendar days after Mr. Hebert first requested this accommodation and, while this was not in time for the October 12, 2008 meeting, it was in time for the meeting held a week later on October 19, 2008. Id. As a result, two weekly staff meetings were held at 9:30 after Mr. Hebert made his request, rather than four as the Agency alleged (see above, at 9-10, paras. 23-24). Mr. Garcia's testimony reveals that in accommodating Mr. Hebert's request, he was also attempting to avoid disrupting the Agency's IT functions and IT's ability to provide support internally and to other state agencies, a balancing that he had also attempted when he scheduled the weekly managers staff meetings for 9:30 a.m. (see above, at 5-6, para. 14).

This balancing was not contrary to Agency rules or procedures; it was, instead, entirely consistent with the Agency's expectations. Ms. Shaevel, the Agency's Deputy Director of Human Resources, testified that the Agency's managers (Mr. Garcia included) were responsible for balancing the "conflicting values" of individual employee accommodation and agency customer needs, although the Agency had given them no instructions as to how these conflicting values were to be balanced or whether any of them were to be assigned a higher priority (see above, at 9, para. 22). Most notably, Ms. Shaevel did not opine that individual accommodation was the preponderating value in this balancing process; in addition, she did not testify that the Agency had ever instructed its managers to treat it as the preponderating value.

There is no evidence that Mr. Garcia actually gave less weight to Mr. Hebert's accommodation request than he did to IT customer service needs. But however he balanced these two competing values, Mr. Garcia changed the starting time of the weekly managers meeting within 8 days after Mr. Hebert requested this accommodation, and the change became effective a week later, when the October 19, 2007 managers staff meeting started at 10:00 a.m. The total time elapsed from Mr. Hebert's accommodation request, on October 4, 2007, to its implementation on October 19, 2007 was, thus, 15 calendar days. As the Agency had set no deadline by which this balancing process was to be completed, the accommodation of Mr. Hebert's request within 15 days violated no identified agency policy. The absence of agency policy on this point aside, there is no evidence that 15 days was an unreasonable time within which to balance the requested accommodation against the needs of the Agency's IT customers and act upon the requested accommodation—in this case, to grant it, as Mr. Garcia did.

b.

The Agency urged that I focus, instead, upon what it described as Mr. Garcia's resistance and hostility to Mr. Hebert's request that the weekly managers meeting start at a later time.<sup>7</sup> Its evidence on this point consisted of Ms. Shaevel's opinion testimony and the apparent tone of the October 12, 2007 email exchange (Exhibit 3; see above, at 6-7, paras. 151-16). Neither demonstrates intent on Mr. Garcia's part to violate the Agency's policies against workplace discrimination or violence, however.

I.

Ms. Shaevel's opinion that Mr. Garcia resisted the requested accommodation and viewed the request as a "power struggle" was based upon her assumption that Mr. Hebert missed four weekly managers staff meetings at 9:30 a.m. that Mr. Garcia scheduled despite Mr. Hebert's request for a

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<sup>7</sup>/ In its post-hearing memorandum, for example, the Agency asserted that Mr. Garcia "refused to engage in a reasonable accommodation dialogue with Mr. Hebert and told him that he would not move the meeting time." Employer's Post-Hearing Memorandum (May 2, 2008), at 4.

10:00 a.m. start time (see above, at 9-10, paras. 23-24). This assumption is factually flawed, however, and therefore so, too, is Ms. Shaevel's opinion that Mr. Garcia engaged in a "power struggle" with Mr. Hebert regarding his accommodation request.

Mr. Hebert testified that he missed three or four of the 9:30 managers staff meetings but he did not identify dates on which he missed them other than October 5 and 12, 2007. (Hebert dir.) Mr. Garcia recalled that Mr. Hebert missed one of the managers staff meetings that began at 9:30 a.m. (Garcia cross). Ms. Shaevel's testimony that he missed four meetings (Shaevel dir) is not reliable on this point because it was not based upon personal knowledge, and she did not identify the sources from which she gleaned this information. The October 12, 2007 email exchange between Mr. Hebert and Mr. Garcia (Exh. 3) show that the first request by Mr. Hebert to change meeting starting times from 9:30 a.m. to 10:00 a.m. was made on October 4, 2007 (at 4:30 p.m. on the day before the October 5, 2007 managers staff meeting), and neither that email nor any of the others mentions any previous meeting missed, such as the meeting held on Friday, September 28, 2007. The October 12, 2007 emails indicate that Mr. Hebert did not attend the 9:30 meeting held on that date. Mr. Hebert did not testify that he missed the October 19, 2007 meeting, or that the meeting held on that date started earlier than 10:00 a.m., and there is no other evidence showing that he missed it.

The evidence shows, thus, two "missed" meetings; one of them occurred less than 24 hours after Mr. Hebert requested a later starting time (the October 5, 2007 managers staff meeting) and the other occurred on October 12, 2007, the same date by which Mr. Garcia was able to rearrange other scheduling to accommodate Mr. Hebert's request, but too late for this meeting to be rescheduled. This does not support Ms. Shaevel's assumption that Mr. Garcia scheduled, and Mr. Hebert missed, four weekly managers meetings despite Mr. Hebert's request for a later starting time. Because Ms. Shaevel based her "power struggle" opinion upon this factually-unsupported assumption, the opinion is unreliable and does not demonstrate that Mr. Garcia intended to violate the Agency's code of conduct for managers and its nondiscrimination and workplace violence policy.

Beyond that, it also strains credibility to the breaking point to portray the rescheduling that

Mr. Garcia was able to arrange within eight days of Mr. Hebert's request and implement seven days (and one staff meeting) later as a "power struggle" or even as evidence that the request was resisted with discriminatory intent.

ii.

The Agency also emphasized the October 12, 2007 emails (Exh. 3) as evidencing hostility on Mr. Garcia's part to a reasonable request by Mr. Hebert to reschedule the weekly managers staff meetings (see above, at 6-7, paras. 15-16). A critical fact revealed by the emails was, however, that Mr. Garcia had already rescheduled the weekly managers meetings as Mr. Hebert had requested when the emails in question were exchanged, although he was not able to do so in time to reschedule the October 12, 2007 meeting. Nonetheless, making the requested accommodation hardly squares with the alleged discriminatory intent, even if the tone of the emails were to be read as evincing some degree of resistance to the requested accommodation.

It is not even clear, however, that the emails evinced a resistant state of mind, let alone hostile intent. There may have been, instead, a mutual misunderstanding expressed in the October 12, 2007 emails regarding the status of Mr. Hebert's accommodation request. Mr. Garcia had already changed the meeting starting time to 10:00 a.m. when Mr. Hebert commenced the exchange of emails on October 12, 2007 that comprise Exhibit 3. Mr. Hebert's direct testimony indicated that he may not have known of the change when he sent his emails on that date. Compounding the confusion, Mr. Hebert may have assumed (incorrectly, as it turned out) that because the October 12, 2007 meeting started at 9:30 a.m. rather than at 10:00 a.m., Mr. Garcia had rejected the requested accommodation. For his part, Mr. Garcia may have assumed from Mr. Hebert's email that Mr. Hebert knew or understood that the meeting start time had been changed to 10:00 a.m. starting on October 19, 2007—note his reference, in the 11:55 a.m. email he sent on October 12, 2007, to the "update to these meetings" (see above, at 5-6, para. 15(d)— and was now rejecting this accommodation as insufficient. In the context of these misunderstandings, Mr. Garcia's emails can be read reasonably as expressing concern that Mr. Hebert was rejecting the accommodation he had

himself proposed and was requesting a different accommodation, rather than as expressing hostility or resentment about the original accommodation request.

The testimony did not clarify these ambiguities. As a result, the emails comprising Exhibit 3 do not show clearly that Mr. Garcia resisted the 10:00 a.m. managers meeting start time that Mr. Hebert requested, or that he was hostile toward Mr. Hebert regarding this accommodation request. In short, the emails do not show that Mr. Garcia intended to violate the Agency's policies against workplace discrimination and violence.

c.

The Agency offered, relative to Mr. Garcia's intent, the February 8, 2008 memorandum summarizing the internal discrimination investigation that Mr. Owens sent to Mr. Garcia (Exh. 7). However, this very brief memorandum does no more than summarize the investigators' conclusions regarding Mr. Hebert's discrimination complaint without reciting any supporting facts (see above, at 10-11, paras. 25-27). The memorandum refers, for example, to "jokes," "inappropriate comments" and "hostile treatment" that Mr. Garcia allegedly directed at Mr. Hebert, but these adjectives are themselves nothing more than conclusory descriptors; there is no recitation of the words or phrases that the memorandum brands as "jokes" and "inappropriate comments" or of the conduct that it brands as "hostile treatment," and the memorandum does not state when or where these alleged offenses occurred.

These omissions are a matter of concern because Mr. Garcia had raised serious issues regarding Mr. Hebert's performance prior to and during the time of the investigation (see above, at 7-8, para. 19), and it is not clear whether this fell within the scope of what the memorandum characterized as "jokes," "inappropriate comments" and "hostile treatment." The Agency's testimony did not clarify this point, and nor did it offer support for the memorandum's assertion that Mr. Garcia had directed "jokes," "inappropriate comments" and "hostile treatment" toward Mr. Hebert. Mr. Hebert did not mention "jokes" or "inappropriate comments" in his testimony, and he did not characterize Mr. Garcia's conduct towards him as "hostile" or "threatening." Mr. Owens,

the author of the February 8, 2008 memorandum, did not testify, and neither did Ms. Stolberg and Ms. Newcomb, who participated in the investigation to which the memorandum refers. The Agency offered neither investigators' notes nor any other records of the investigation to which the memorandum refers; nor did it represent whether such records were maintained and, of so, whether they still exist. Ms. Shaevel recalled only that there was an investigation conducted by Mr. Owens. She did not participate in the investigation, however, and had no knowledge of how it was conducted, who else participated in it, and what information was considered during the investigatory process. (Shaevel cross; Shaevel AM). As a result neither the memorandum's conclusions nor the underlying factfinding could be amplified or challenged via cross-examination.

The memorandum furnishes, thus, no reliable evidence of hostility or discriminatory intent on Mr. Garcia's part.

The ambiguities that remain regarding Mr. Garcia's state of mind do not merely leave the evidence in equipoise. They undercut the Agency's case rather than Mr. Garcia's because, per Still, the Agency had the burden of proving, by a preponderance of the evidence, all of the facts needed to establish Mr. Garcia's disqualification from receiving unemployment insurance benefits under M.G.L. c. 151A, § 25(e)(2), including intent to violate the Agency's anti-discrimination and anti-workplace violence policies.

The Agency did not show such intent on Mr. Garcia's part, whether as to the manner in which Mr. Garcia responded to Mr. Hebert's accommodation request, or the time he took to make the accommodation, or the outcome of the request. There was, in contrast, testimony by Mr. Garcia that he balanced Mr. Hebert's accommodation request and IT customer needs (consistent with the Agency's balancing expectations, as Ms. Shaevel described them) and that he had, within 15 days, implemented fully the later managers meeting starting time that Mr. Hebert requested. This testimony was neither shaken by cross-examination nor contradicted by competing evidence.

3.

I find two mitigating factors that must also be taken into account in considering Mr. Garcia's state of mind, neither of which support the Agency's assertions of intentional policy violations.

One of them, discussed above, is the Agency's expectation that its managers would balance the "competing values" of employee accommodation and agency customer needs, and Mr. Garcia's attempt to do so—successfully and promptly, as it happened. Mr. Garcia's efforts to balance these values as the Agency expected him to do demonstrates an attempt to further the Agency's policies rather than an intent to violate them.

The other mitigating factor is Mr. Garcia's own disability (see above, at 3, para. 1). Mr. Garcia testified, without contradiction, that his own experience with pain on a daily basis made him sympathetic to Mr. Hebert and led him to do all he could to accommodate Mr. Hebert's request that the weekly managers staff meetings start at a later time. This testimony was credible, rather than self-serving, because Mr. Garcia accommodated Mr. Hebert's request fully, successfully and promptly, within a short time after the request was made.

### Conclusion and Order

The Agency did not sustain its burden of proving that Mr. Garcia intended to violate its code of conduct for managers or its nondiscrimination and workplace violence policies. There is no evidence that Mr. Garcia denied Mr. Hebert's request to accommodate his disability-based work schedule by scheduling weekly managers staff meetings to start at 10:00 a.m. rather than at 9:30 a.m. The evidence shows, to the contrary, that Mr. Garcia made and fully implemented this requested accommodation within 15 calendar days after Mr. Hebert made the request. The Agency did not show that in doing so, Mr. Garcia resisted the requested accommodation, was hostile to Mr. Hebert, or engaged in conduct intended to violate the Agency's policies. The evidence shows, in contrast, that Mr. Garcia balanced the accommodation request and Agency IT customer needs, as the Agency

expected him to do, and, in a relatively short time, rearranged other scheduled IT meetings and tasks and granted the managers meeting starting time change that Mr. Hebert had requested. Mitigating factors, including Mr. Garcia's own disability and his intent to balance the requested accommodation and Agency IT customer needs in accordance with the Agency's expectation that he do so, demonstrate as well that Mr. Garcia did not knowingly violate the policies in question.

The Agency did not prove all of the facts required to show that Mr. Garcia was disqualified from receiving unemployment insurance benefits pursuant to M.G.L. c. 151A, § 25(e)(2). Accordingly, the decision of the Department of Workforce Development's Division of Unemployment Assistance denying Mr. Garcia's unemployment benefits claim pursuant to M.G.L. c. 151A, § 25(e)(2) is vacated, and the matter is remanded to the Division for a determination of Mr. Garcia's unemployment benefits consistent with this decision.

#### Notice of Appeal Rights

Pursuant to M.G.L. c. 151A, § 40, a party aggrieved by this Decision and wishing to appeal must file an application for review by the Board of Review of the Department of Workforce Development within 30 calendar days from the date on which this decision was mailed to that party.<sup>8</sup>

Dated: July 2, 2008

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Mark L. Silverstein  
Administrative Magistrate

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<sup>8</sup>/ The application for review by the Board of Review, known as "Form 1801," may be found at the Department of Labor and Workforce Development's website page entitled "Filing an Application with the Board of Review." This page may be accessed by block-copying the following address, pasting it into the web browser, and then hitting Enter on the keyboard:

[http://www.mass.gov/?pageID=elwdterminal&L=6&L0=Home&L1=Claimants&L2=Unemployment+Insurance+\(UI\)&L3=File+your+Unemployment+Insurance+Claim&L4=Issues+with+Claims&L5=Your+Right+to+Appeal&sid=Elwd&b=terminalcontent&f=dua\\_issues\\_claims\\_appeal\\_app\\_for\\_review&csid=Elwd](http://www.mass.gov/?pageID=elwdterminal&L=6&L0=Home&L1=Claimants&L2=Unemployment+Insurance+(UI)&L3=File+your+Unemployment+Insurance+Claim&L4=Issues+with+Claims&L5=Your+Right+to+Appeal&sid=Elwd&b=terminalcontent&f=dua_issues_claims_appeal_app_for_review&csid=Elwd)